IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 8

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

On Appeal From the United States District Court for the District of Columbia

BRIEF FOR APPELLANTS RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

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OPINIONS BELOW

The opinion of the District Court (R. 192-195) is reported at 144 F. Supp. 365. The opinion of the Interstate Commerce Commission (R. 93-121) is reported at 63 M.C.C. 91.

JURISDICTION

The judgment of the District Court was entered on January 27, 1956 (R. 195). Notice of appeal was filed in the District Court by the Railway Labor Executives' Association, *et al.*, on March 26, 1956 (R. 204),

and the appeal in Case No. 8 was docketed in this Court on May 24, 1956. The Interstate Commerce Commission on June 20, 1956, filed a motion to affirm the judgment below and on October 15, 1956, this Court noted probable jurisdiction and consolidated the appeal with Case No. 6 for hearing (R. 204). The jurisdiction of the Court to review the judgment of the District Court by direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code [28 U.S.C. 1253 and 2101(b)].

QUESTIONS PRESENTED

This appeal presents these questions:

1. Does the Commission have authority under Section 207(a) of the Interstate Commerce Act to grant a railroad subsidiary unlimited motor carrier operating rights without restriction to services which are auxiliary to or supplemental of the parent railroad's train operations?

2. Assuming, *arguendo,* that the Commission does have the authority stated in question 1; the further question is presented as to whether the Commission has the authority under Section 207(a) to grant a railroad subsidiary unlimited operating rights in circumstances where:

(a) such rights cover the identical basic routes and operations previously acquired by the rail subsidiary from an independent motor carrier with Commission approval subject to restrictions limiting services thereunder to those which are auxiliary to or supplemental of the parent railroad's train service pursuant to the requirement of Section 5(2)(b) of the Interstate Commerce Act; and

(b) the only purpose of the 207 proceeding and effect of the Commission's action therein is to remove the restrictions previously imposed without regard to the statutory requirements under which they were imposed and without finding that the unlimited service thus authorized will enable the parent railroad to use motor vehicles to public advantage in its own train operations.

3. The Court has invited appellants to address themselves to the further question of their standing to sue.

STATUTES INVOLVED

This appeal involves the National Transportation Policy [49 U.S.C., preceding Section 1], Sections 5(2)-(a) and (b), 205(j), 206, 207(a), 208], and former Section 213(a)(1) of the Interstate Commerce Act, as amended [49 U.S.C. 5(2)(a) and (b), 306, 307(a)-(1), 308(a) and 313(a)(1)]. These statutory provisions are set forth in Appendix A hereto.

STATEMENT

The orders of the Interstate Commerce Commission which appellants seek to void granted certificate authority to the Rock Island Motor Transit Company (hereinafter called "Motor Transit", a wholly-owned subsidiary of the Chicago, Rock Island and Pacific Railroad (hereinafter called "Rock Island Railroad")[1] to transport by motor vehicle general commodities, with certain exceptions, between various points in Illinois, Iowa and Nebraska (R. 116, 122). The orders contained no restrictions limiting the trucking operations of Motor Transit to service auxiliary to or supplemental of the parent railroad's train serv-

[1] R. 3, 95.

ice. It is the position of the appellants that such restrictions were required in this case by the Interstate Commerce Act.

It was agreed before the District Court that the statutory requirement that the motor carrier service be used in the operation of the railroad means, in its practical application by the Commission, that such service be auxiliary to or supplemental of the rail operation (R. 193). See also *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 422, *reh. den.*, 341 U.S. 906.

At the time the Commission orders were issued, Motor Transit already held certificate authority from the Commission to conduct motor carrier operations over the routes in question (R. 3-10, 96). Such authority had been acquired by Motor Transit pursuant to Commission approval under former Section 213 and present Section 5(2)(b) of the Interstate Commerce Act for the company to purchase the operating rights and properties of two independent motor carriers subject to restrictions designed to ensure that Motor Carrier's operation of the purchased routes would be auxiliary to or supplemental of the Rock Island's train service. These acquisitions, from which the Commission removed the restrictions in the orders at issue, were as follows:

(1) The Commission orders under review authorized Motor Transit to operate on an unrestricted basis between Omaha, Nebraska, and Silvis, Illinois, over U. S. Highway 6 and Illinois Highway 92 via certain intermediate points, and to serve Cedar Rapids from Iowa City which is located on U. S. Highway 6 (R. 116). Motor Transit purchased the operating rights for this route from the White Line Motor Freight Company

in 1937.[2] The Commission approved the purchase pursuant to then Section 213 of the Interstate Commerce Act, which required the agency to find, *inter alia*, that the transaction would promote the public interest by enabling the parent Rock Island Railroad to use the proposed motor service to public advantage in the railroad's own operations. *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 5 M.C.C. 451 (1938). The Commission made the necessary statutory finding upon the basis of representations by Motor Transit that it would provide a coordinated rail-motor service over the purchased routes and thus improve the parent Rock Island Railroad's service to the public (2d. at p. 455). In addition, in order to comply with the statutory requirement, the Commission required Motor Transit to abandon parts of the White Line purchase not adjacent to the line of the Rock Island Railroad and imposed the following limitations in the certificate issued pursuant to its approval: (a) that Motor Transit should not render service from or to, or interchange traffic at, any point other than a station on the line of the parent railroad; (b) that the operating authority acquired was subject to such further limitations, restrictions, or modifications as the Commission might find necessary to impose or make in order to ensure that the motor trucking operation be auxiliary to or supplemental of the railroad's train service and not unduly restrain competition. Subsequently, the Commission, acting upon its own motion pursuant to the prior reservation of jurisdiction, reopened the proceeding and imposed additional restrictions upon the

[2] The vendor at the time of the acquisition was in process of perfecting the operating rights it sold to Motor Transit under Section 206(a) of the Interstate Commerce Act, 49 U.S.C. 306(a).

operating rights acquired by Motor Transit from the White Line in order to ensure that Motor Transit's operations thereunder were auxiliary to or supplemental of the parent railroad's train service.[3] *Rock Island M. Transit Co.—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946); 55 M.C.C. 567 (1949). This Court sustained the validity of the Commission's action. *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), *reh. den.*, 341 U.S. 906.

(2) The orders here involved also granted Motor Transit unrestricted operating rights (a) between Harlan, Iowa, and Omaha, Nebraska, over Iowa High-

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[3] The specific conditions imposed were:

1. The service to be performed by the Rock Island Transit Company shall be limited to service which is auxiliary to, or supplemental of, train service of the Chicago, Rock Island and Pacific Railway Company.

2. The Rock Island Motor Transit Company shall not render any service to, or from or interchange traffic at any point not a station on the rail line of The Chicago, Rock Island and Pacific Railway Company.

3. No shipments shall be transported by The Rock Island Motor Transit Company between any of the following points, or through, or to, or from, more than one of said points: Omaha, Nebraska, Des Moines, Iowa, and collectively Davenport and Bettendorf, Iowa, and Rock Island, Moline, and East Moline, Illinois.

4. All contractual arrangements between The Rock Island Motor Transit Company and The Chicago, Rock Island and Pacific Railway Company shall be reported and shall be subject to revision, if and as it is found to be necessary in order that such arrangements shall be fair and equitable to the parties.

5. Such further specific conditions as the Commission in the future, may find it necessary to impose in order to insure that the service shall be auxiliary to, or supplemental of, train service.

way 64 and U. S. Highway 6, via various intermediate points, and (b) between Avoca, Iowa, and Atlantic, Iowa, over U. S. Highways 59 and 6 and Iowa Highway 83 (R. 117). Motor Transit purchased the operating rights for this route from Messrs. D. H. Frederickson and J. H. Frederickson in 1944. The Commission approved the purchase pursuant to Section 5(2)(b) of the Interstate Commerce Act, which section had replaced Section 213(a)[4] and which also required the Commission to find that the purchase would enable the parent Rock Island to use the trucking rights involved to public advantage in its own operations. *Rock Island Motor Transit—Purchase—Frederickson*, 34 M.C.C. 824 (1944). The Commission in its original order approving the purchase did not make any findings or impose any restrictions to meet this statutory requirement. However, prior to the issuance of a certificate covering the Frederickson rights, the agency reopened the acquisition proceeding as part of its reconsideration of the White Line Purchase, *supra*, p. 6, and in such reconsidered proceedings imposed the same restrictions upon the Frederickson rights as it did upon the White Line rights. This Court also upheld the validity of the Frederickson conditions. *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), *reh. den.*, 341 U.S. 906.

These specific conditions were imposed by the Commission on the White Line and the Frederickson pur-

[4] Section 213 was repealed by the Transportation Act of 1940, 54 Stat. 924, Section 21(e), and its substance was carried forward into Section 5(2)(b) of the Interstate Commerce Act. There is a slight difference in wording in the proviso as found in Section 213(a)(1) and Section 5(2)(b). The Commission has held, however, that this difference is of no significance. *Scott Bros. Inc.—Central—W. G. Corp.*, 37 M.C.C. 225 (1941).

chases because it was clear that contrary to the Motor Transit's original representations to the Commission and to the specific and unambiguous limitations of Section 5(2)(b) of the Interstate Commerce Act the purchased routes had been operated without regard to their relationship to the parent railroad's services. This fact was brought out in the record of the present proceeding in the testimony of Motor Transit's officers that "Although Motor Transit is a subsidiary of Rock Island, it operated prior to September 11, 1951, under permanent authority in substantially the same manner as any independent motor carrier transporting less-than-truckload and truckloads of general freight over practically all of its authorized routes in Iowa" (R. 11). Thus, when this Court sustained the Commission's action in the *Rock Island* case as merely the exercise of a statutory authority to limit motor carrier operations of rail subsidiaries, Motor Transit was at long last faced with the necessity of complying with the statutory requirements it had theretofore ignored. The device hit upon to avoid these statutory requirements was to file an application for the same routes under Section 207 of the Interstate Commerce Act [49 U.S.C. 307] without the restrictions. This advice was given by new counsel hired to handle the matter as shown by the following findings of the Examiner in the record before the Court (R. 74):

> "Thereafter, Motor Transit changed counsel with respect to this matter and he advised Motor Transit to seek limited temporary authority and to file an application under Section 207 of the act for permanent authority."

Motor Transit followed this advice and on October 26, 1951, filed an application, as subsequently amended

(R. 2), for the same routes it already had without the restrictions imposed upon operations over such routes by the Commission's certificate of September 11, 1951 (R. 10).

This application was clearly nothing more than a request to remove the restrictions imposed on its operations in accordance with the requirements of Section 5(2)(b) of the Interstate Commerce Act.

Both the Examiner and the Commission recognized that Motor Transit was in the same legal situation under its application as the carrier was in 1947 during the reopened acquisition proceedings and found that its application was simply the means to give it an opportunity to introduce evidence on the necessity of the specific conditions which it had previously declined to do in the reopened proceedings in favor of a challenge to the Commission's authority. This recognition is evidenced by the following Examiner's finding on the nature of Motor Transit's Section 207 application (R. 74):

> "Thus, after the passage of approximately four years, Motor Transit concluded to do substantially what it had an opportunity to do in October, 1947, namely to introduce additional evidence in the reopened proceeding."

The Commission repeated this finding in *haec verba* (R. 109).

Thus both the Examiner and the Commission recognized what was the obvious fact, *i.e.*, that the proceedings on the new application were merely another phase of the original acquisition proceedings and that the issues before the agency were those with which it was faced in the reopened acquisition case in 1947. There-

fore, Motor Carrier's application should have been processed in accordance with such findings and the requirements of Section 5(2)(b) so that the restrictions should have been removed only if the Commission could validly find, which it obviously could not, that the resulting unrestricted operation would enable the Rock Island Railroad to use Motor Transit's services to public advantage in its own train operations.

However, the Commission closed its eyes to its own findings as to the true nature of the situation and treated the application as if it involved an application under Section 207 for new routes not previously operated by the carrier and on this basis held that it was not legally required to meet the standards of Section 5(2)(b), because the limitations found in that section on the operation of truck routes by railroads or railroad subsidiaries are not found in Section 207 (R. 105). Thus freed in its view of the statutory limitations by this extraordinary gambit, the Commission went on to find that it would not as a matter of policy impose any restrictions designed to keep Motor Transit operations auxiliary to or supplemental of the railroad's train service (R. 105-116). It therefore granted Motor Transit's request solely upon the basis of findings as to the public convenience and necessity (R. 116) and determined to issue to the carrier an unrestricted certificate covering the routes in question which would permit it to conduct an independent trucking operation wholly unrelated to its parent railroad's services.[5]

The Commission did not say what became of its certificate of September 11, 1951, which is still outstanding and which limits Motor Transit's operations over

[5] Two conditions were imposed which in no way limited the scope of operations under the certificate (R. 117).

the routes to those auxiliary to or supplemental of its parent railroad's train service.[6]

On July 6, 1955, and September 9, 1955, the Commission reaffirmed this action and rejected the petitions for reconsideration filed by various motor carriers, which are appellants in Case No. 6, and by the railway labor organizations, appellants in Case No. 8 (R. 122, 137, 161).

Thereafter, the motor carrier protestants, the American Trucking Associations, Inc., *et al.*, filed their complaint in the District Court on June 19, 1956, asking for a permanent injunction against the effectiveness of the Commission's orders (R. 85). The appellants filed motions to intervene in the case as parties-plaintiff and asked for permission to file complaints requesting that the Commission's orders be set aside and enjoined (R. 140, 157). These motions, which were not opposed, were granted by orders of the District Court entered on October 24, 1955, and the complaints of the intervening plaintiffs were filed the same day (R. 171, 172).

The appellants argued to the District Court that the Commission had erred as a matter of law in granting Motor Transit unrestricted operating rights without finding that operations pursuant thereto would enable the parent Rock Island Railroad to use such service by motor vehicle to public advantage in the railroad's own operations (R. 148, 150, 165-167). The District Court rejected this argument on the ground that the

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[6] During the pendency of this latest phase of the *Rock Island* case, Motor Transit has operated over the routes involved under a temporary authority subject to maximum weight limitations and "keypoint" restrictions.

Commission's action involved only the issuance of a certificate under Section 207(a) of the Interstate Commerce Act, which does not in terms require the finding alleged to be necessary (R. 194)[7] The District Court therefore affirmed the Commission's orders against the complaints of the appellants and entered judgment for the Commission and the United States (R. 195).

The District Court's opinion gave no consideration to the fact that the application of Motor Transit to the Commission was in substance a request to remove restrictions from certificates issued to it pursuant to acquisition proceedings under former Section 213 and present Section 5(2)(b) of the Interstate Commerce Act. Nor does such opinion reflect any consideration of the Commission's long established practice of treating applications to the agency by railroads or by railroad subsidiaries for motor carrier operating authority under Section 207(a) of the Interstate Commerce Act as governed by the same basic considerations as applications by such parties made under Section 5(2)(b) of that Act (R. 192-195).

SUMMARY OF ARGUMENT

1. This is th first time to our knowledge when the Commission has urged to this Court that it has the discretion under the Interstate Commerce Act to grant a railroad subsidiary authority to conduct unrestricted motor carrier operations without regard to the limitations expressed in Section 5(2)(b) of the Interstate Commerce Act and contained in the National Trans-

[7] The District Court also dealt with certain contentions of plaintiffs motor carriers, not involved in the complaints of the railway labor organizations, that the evidence before the Commission did not support the agency's findings (R. 194, 195).

portation Policy simply because the applications were filed pursuant to Section 207 of the Act governing the issuance of certificates of public convenience and necessity. By such decision the Commission has reversed a consistent practice to the contrary of over twenty years standing and is taking action which is not only contrary to Congressional intent but is completely incompatible with previous decisions of this Court which have examined and approved the heretofore contrary practice of the Commission. *United States* v. *Rock Island Motor Transit Co.*, 340 U.S. 419 (1951); *United States* v. *Texas & Pacific Motor Transit Co.*, 340 U.S. 450 (1951); *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945); *American Trucking Assns., Inc.* v. *United States*, 326 U.S. 77 (1945).

2. If the Commission's decision is permitted to stand, the circumstances under which it was rendered in the instant case clearly disclose that the statutory restrictions contained in the proviso to Section 5(2)-(b) of the Interstate Commerce Act will become meaningless. It is undisputed that the only purpose of the application by Rock Island Motor Transit Company under Section 207 was to obtain unrestricted motor carrier operating authority by ridding itself of restrictions and conditions previously imposed upon it by the Commission in acquisition proceedings covering the identical basic routes and operations here involved and subsequently upheld as valid statutory requirements by this Court in *United States* v. *Rock Island Motor Transit Co.* 340 U.S. 419. Hence it is clear that although the application approved by the Commission was in form one for the grant of a new certificate, in substance it was obviously a deliberate evasion of the statutory requirements of Section 5(2)(b).

The Commission's sanction of such a manifest circumvention of Congressional intent is a patent distortion of the statutory purpose with regard to railroad-controlled operations in the motor carrier field. Unless the lower court's affirmance of the Commission's decision is reversed by this Court, a chaotic condition could immediately develop. Under the Commission's decision, every railroad or railroad subsidiary now conducting motor carrier operations acquired by purchase under Section 5(2) of the Act and subject to specific limitations restricting such operations to serve which is auxiliary to or supplemental of the railroad's train operations could, through the mere filing of an application under Section 207, obtain from the Commission a certificate authorizing it to operate over the same routes without restriction.

3. The railway labor appellants have standing to contest the validity of the Commission's orders before the courts. They had a legal interest which entitled them to participate as a party in interest before the Interstate Commerce Commission pursuant to the provisions of Section 205(e) and Section 17(11) of the Interstate Commerce Act, 49 U.S.C. §§ 305(e) and 17(11), and they were permitted to intervene therein by order of the Commission. The stated reason for their intervention was the threat to the security of their jobs and working conditions with the Rock Island Railroad by the removal of previously imposed restrictions which confined the railroad's operations to those integrated with rail service rather than an unrestricted motor service substituting trucks for rail operations. The Commission's grant of appellants' participation as a party in interest was proper. See *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Ry. Co.*, 331 U.S. 519.

Appellants were also entitled to test the validity of the Commission's action in the District Court as a matter of legal right. Section 2323 of the Judicial Code, 28 U.S.C.A. § 2323. This section provides that any party in interest to the proceeding before the Interstate Commerce Commission in which an order or requirement is made may appear as a party on his own motion and as of right in any action involving the validity of such Commission order or requirement. The right of appellants to protest the Commission's action in the court below is also clearly established by this Court's decision in *Baltimore & Ohio Ry. Co.* v. *United States*, 264 U.S. 258, 268.

The appellants also clearly have a sufficient interest to appeal the judgment of the District Court to this Court. *Baltimore & Ohio Ry. Co.* v. *United States*, 264 U.S. 258, 268. That appellants are the proper parties to represent the interests of the Rock Island employees has already been recognized by this Court in other actions testing the validity of Commission action. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373; *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142.

ARGUMENT

I

IN AUTHORIZING THE PERFORMANCE OF MOTOR CARRIER SERVICE BY RAILROADS OR THEIR SUBSIDIARIES PURSUANT TO APPLICATIONS FILED UNDER SECTION 207 OF THE INTERSTATE COMMERCE ACT, THE COMMISSION IS REQUIRED BY STATUTE TO LIMIT THE OPERATIONS TO THOSE WHICH ARE AUXILIARY TO OR SUPPLEMENTAL OF THE APPLICANT'S RAIL SERVICE.

The Commission's determination that the ability of a railroad subsidiary to meet the limitations contained in the proviso to Section 5(2)(b) of the Interstate Commerce Act is not a necessary requirement in the

adjudication of an application of such subsidiary for a certificate of public convenience and necessity under Section 207(a) is contrary to the express policy of the statute, the Commission's past application of that policy, and the legislative history of the statutory provisions.

The National Transportation Policy [49 U.S.C., preceding section 1] requires, *inter alia*, the recognition and preservation of the inherent advantages of each mode of transportation covered by the Interstate Commerce Act. The Commission has found that the achievement of this policy, as applied to motor carrier operations by railroads and railroad subsidiaries, requires the restriction of such operations to those which are auxiliary to or supplemental of the rail service of the railroad involved. *Pennsylvania Truck Lines, Inc.—Control—Barker*, 1 M.C.C. 101 (1936), 5 M.C.C. 9 (1937); *Kansas City Southern Transport Company, Inc.—Com. Car. App.*, 10 M.C.C. 21 (1938). In the present case the Commission takes the position that it need not apply this Congressional purpose because Section 207(a) does not contain the express restrictions contained in the proviso of Section 5(2)(b). However, Congress did not so limit its purpose. The last sentence of the National Transportation Policy states that, "All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy." The effect of this language is to require the Commission to carry out the Congressional purpose to the same extent in the administration of Section 207(a) as it does in the administration of Section 5(2)(b). Congress has written limitations into Section 207(a) upon railrload entry into motor carrier service just as plainly and clearly

as if it had inserted into that section the actual words appearing in Section 5(2)(b).

The requirement of a uniform administration of the certificate and acquisition provisions of the Interstate Commerce Act and a correlation of the two has been recognized by the Commission and by the courts. In *Associated Transport, Inc.—Purchase—Russell*, 55 M.C.C. 177 (1948), the Commission declared (p. 183):

> "Although the facts dealt with are dissimilar the same National Transportation Policy applies and the same basic considerations govern, in the disposition of applications under section 5 and section 207 of the Act."

To the same effect is the statement of this Court in *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373, 376, 377 (1942), that the Commission must carry out the purposes of the statute in applying the phrase "public convenience and necessity" to the same extent that it does in acting under Section 5.

Moreover, the Commission has implemented this construction of the statute by its long and consistent uniform application of the auxiliary or supplemental restrictions to cases both under Section 5 and Section 207. In the earlier case involving Motor Transit, *Rock Island Motor Transit Company—Purchase—White Line M. Frt.*, 40 M.C.C. 457 (1946), the Commission reviewed its past application in Section 207 proceedings of the requirements of Section 213 (pp. 461-462). It concluded (p. 468) that Congress, in re-enacting Section 213 into Section 5(2) in 1940, had given its approval of this established administrative practice. Finally, the Commission categorically stated that the

been recognized by this Court as the representative of employees who are members of its constituent organizations in actions testing the validity of Commission action. *Interstate Commerce Commission* v. *Railway Labor Executives' Association*, 315 U.S. 373 (1942); *Railway Labor Executives' Association* v. *United States*, 339 U.S. 142 (1950). It is admitted that members of the Association have agreements with the Rock Island on behalf of the employees of that carrier (R. 147, 174, 186). It is also admitted that the other intervening railway labor organizations before the Commission which are appellants here represent employees of the Rock Island under the Railway Labor Act (R. 163, 177, 189).

The Commission recognized the clear standing of the appellants to participate as parties in the proceedings before the agency upon behalf of the Rock Island's employees and granted their petitions to intervene (R. 122, 151, 161). No issue was raised in the Court below as to the validity of this action.

International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers
International Brotherhood of Electrical Workers
International Brotherhood of Firemen & Oilers
International Organization Masters, Mates & Pilots of America
National Marine Engineers' Beneficial Association
Order of Railway Conductors and Brakemen
The Order of Railroad Telegraphers
Railway Employes' Department, AFL-CIO
Railroad Yardmasters of America
Sheet Metal Workers' International Association
Switchmen's Union of North America

requirements of the National Transportation Policy required the same treatment for railroad or railroad-controlled applicants in Section 207 cases as in Section 5 cases. It said (p. 471):

> "From a regulatory standpoint motor-carrier operations conducted by a railroad affiliate should be the same whether the authority under which they are conducted was acquired by an application under Section 207 or by purchase . . ."

Such Commission application of the requirements of Section 5(2)(b) in Section 207 proceedings has been recognized and approved by this Court in both *United State* v. *Rock Island Motor Transit Co.*, 340 U.S. 419, 450 (1951), and in *United States* v. *Texas and Pacific Motor Transport Co.*, 340 U.S. 450, 459 (1951).

The Commission has argued that its present interpretation is consistent with its past administrative practice. The short answer to such contention is that this Court has expressly found to the contrary. In *United States* v. *Rock Island Motor Transit Company*, 340 U.S. 419 (1951), the Court stated (p. 428):

> "Although Section 207, providing for the issuance of certificates of convenience and necessity, has no clause requiring special justification for railroads to receive motor-carrier operating rights, such as appears in the proviso in former Section 213, present Section 5, the Commission applies the rules of the National Transportation Policy so as to read the proviso into Section 207 in order to preserve the inherent advantages of motor-carrier service."

Also, in *United States* v. *Texas and Pacific Motor Transport Company*, 340 U.S. 450 (1951), the Court observed (pp. 458 and 459):

> "This proceeding involves certificates for new routes under Section 207. No such certificates or applications were in that case [i.e., the Rock Island case]. The opinion, however, considered the Commission's practice in Section 207 proceedings and stated that it was the same as in Sections 5 and 213 acquisition proceedings."

These conclusions of the Court leave no room for argument as to what the Commission's past construction of the statute has been.

The Commission's past practice and interpretation of the statute also received the sanction of this Court in *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60 (1945), which involved an application under Section 207 for extension of motor carrier operating rights by a wholly owned subsidiary of the Pennsylvania Railroad Company. This Court upheld the Commission's action in granting a certificate which was restricted to services truly supplementary or auxiliary to the operations of the parent railroad. The Court reviewed the legislative history of the Motor Carrier Act of 1935 and concluded that railroads may operate trucks "in appropriate places." (pp. 66, 67.) The Court then went on to uphold the validity of the grant of a certificate to the railroad subsidiary and, in so doing, repeatedly emphasized the limited nature of the certificate and the coordinated rail-motor service provided.

In addition, the legislative history of Section 207 supports the conclusion that the standards of Section 5(2)(b) are a legal restriction upon an application of a railroad subsidiary under Section 207. In 1938 Senator Shipstead proposed an amendment to Section 207 which would have specifically written the limitations

B. The Action of the Commission Affected Legal Rights of Rock Island Employees Represented by Appellants Which Entitled Them to Test the Validity of That Action in the District Court.

Shortly after the Commission issued its order of July 6, 1955, denying reconsideration of its action in granting unrestricted operating rights to Motor Transit, the protesting motor carriers filed their complaint in the District Court (R. 85). On September 16, 1955, the appellant Association filed a motion to intervene in the court proceeding as a party plaintiff and for leave to file a complaint (R. 140). This motion alleged that the Association had a legal right to intervene in the case to contest the validity of the Commission's action under Section 2323 of the Judicial Code [28 U.S.C. 2323]; Section 10(a) of the Administrative Procedure Act [5 U.S.C. 1009(a)]; Section 17(11) and 205(g) of the Interstate Commerce Act [49 U.S.C. 17(11) and 305(g)]; and Rule 24 of the Federal Rules of Civil Procedure (R. 142, 143). This claim was unopposed and intervention was granted by the District Court (R. 171). The complaint of the Association, already lodged with the clerk of the Court, was filed pursuant to said order (R. 145, 171). The complaint listed in paragraph 3 thereof the member organizations of the Association (R. 146). It then alleged in paragraph 5 as follows (R. 146, 147):

> "5. Certain of the labor organizations listed in Paragraph No. 2 above, which are members of the Railway Labor Executives' Association, are the duly designated collective bargaining representatives under the Railway Labor Act for most of the employees of the Chicago, Rock Island and Pacific Railroad Company, the parent company of the Rock Island Motor Transit Company, and have agreements with said railroad carrier concerning

of Section 5(2)(b) into Section 207. The proposed amendment was withdrawn after Commissioner Eastman assured Senator Shipstead and the committee considering the amendment that it was the duty of the Commission to apply the restrictive proviso of Section 5(2)(b) in all Section 207 cases, and it was upon this express understanding that the amendment was considered unnecessary. These facts are clearly shown by the record of the hearings before the 75th Congress on S. 3606 at pp. 26-31, 141. Commissioner Eastman first indicated that the proposed amendment was merely an expression of existing law (pp. 27-31):[8]

> "Commissioner Eastman: . . . We have indicated that it seems to us consistent with the policy now reflected in section 213(a), paragraph 1; that his amendment should be added to section 207(a).
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> * * * * *
>
> "As a matter of fact, I think it could be argued with a great deal of force that in interpreting and applying the provisions of section 207(a) as it now stands, the Commission should read the act as a whole and take cognizance of this policy which is now reflected in section 213(a)(1).
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> * * * * *
>
> ". . . If I had to pass on the issue now, I should say that in administering the provisions of section 207, it would be the duty of the Commission to read the act as a whole and to apply the same pol-

[8] The letter of the Commission to the subcommittee dealing with the amendment stated that "in good logic" it could see no reason why the proof requirements as to a railroad subsidiary should be any different in a certificate proceeding than in an acquisition case. The letter further stated that possibly, reading the Act as a whole, it should be so read as it then stood, but since the matter was open to argument, the agency did not object to the amendment. (pp. 31, 32)

icy with respect to the extension of operations of a railroad-controlled motor carrier as is provided by the proviso of section 213.

"Senator Johnson of Colorado: Under the present law?

"Commissioner Eastman: Under the present law."

On this basis Senator Shipstead then withdrew his proposal (p. 141):

"Senator Shipstead: . . . In view of the statement made by Commissioner Eastman for the Commission as to their view of this matter, and also his personal view, that he thinks the provision of this amendment is already in the law, and that . . .

"Senator Johnson of Colorado (interposing) . . . that is, you mean the Shipstead amendment?

"Senator Shipstead: Yes; that it is already in the law, and evidently he considers it unnecessary at the present time. So, in order to save the time of the sub-committee, and in order to facilitate advancing the Commission's recommendations for amendments to the Motor Carrier Act, I withdraw, for the present at least, the amendment I offered. I think we will stand on the Commission's point of view, and the personal view of Commissioner Eastman."

In presenting this argument in answer to question No. 1 presented for determination by our appeal, we have sought to avoid unnecessary repetition of details on the major points above stated, for the reason that the question is the subject of considerable comment and discussion in the brief (pp. 14-47) filed by appellants in No. 6 of this consolidated appeal.

However, in passing to a discussion of our contentions with respect to question No. 2 presented by this appeal, we should add that nowhere in our view is the need or logic of the statutory construction just discussed better illustrated than under the circumstances of the instant case.

II

THE COMMISSION'S ORDERS CONSTITUTE AN INVALID ATTEMPT TO REMOVE THE CONDITIONS IMPOSED ON MOTOR TRANSIT OPERATIONS PURSUANT TO THE STATUTORY REQUIREMENTS OF SECTION 213 AND SECTION 5(2)(b) OF THE INTERSTATE COMMERCE ACT.

Assuming, *arguendo,* the correctness of the Commission's interpretation of Section 207(a) of the Interstate Commerce Act in an appropriate case involving a new route application, we believe that the Commission's action here results in a clear evasion of the statute and represents a complete sacrifice of substance for form.

This case involves the unique and almost unheard of feature of an applicant seeking a certificate to operate over routes already certificated to it by the same agency. It is doubtful whether the Interstate Commerce Commission or any other agency concerned with granting authorization to engage in transportation has heretofore been confronted with such an application. Ordinarily, such application would be dismissed as a sheer waste of the administrative agency's time. In this case the Commission processed the application just as if it were a bona fide new route application and as if Motor Transit had no connection at all with the routes involved. However, it is clear from the facts that although the application was in form one for the grant of a new certificate under Section 207(a), in

substance it was a request to remove the restrictions previously imposed in acquisition proceedings to make Motor Transit's operations auxiliary to or supplemental of the rail service of its parent, the Rock Island Railroad, in accordance with the requirements of Sections 213 and 5(2)(b). This obvious purpose is stated in the findings of the Commission Examiner as follows (R. 10):

> "The restrictions and conditions set forth above were imposed on the certificate and authorities previously issued or granted, and as a result thereof applicant filed the captioned application for authority under section 207(a) of the act *seeking the identical authority it possessed prior to September 11, 1591, when the restrictions and conditions were imposed. The purpose of this application is to obtain operating authority not subject to restrictions or conditions* that prevent applicant from operating as a motor carrier having no affiliation with a railroad." (Italics supplied).

Since Motor Transit's clear purpose was not the grant of a route, but the removal of restrictions on its certificate for an existing route, it should have filed an application asking for modification of the conditions.

Both the Examiner and the Commission recognized that in substance the proceedings were merely a continuation of the acquisition proceedings when they found that Motor Transit was availing itself of the opportunity it had in the 1947 reopened acquisition case to present evidence on the need for restrictions (R. 74, 109). Having so recognized, the Commission should then have treated the Motor Transit application as a request to remove the existing conditions and measured this request against the standards of Section 5(2)(b) since it is clear that in the 1947 proceedings

Motor Transit could not have obtained a complete removal of the restrictions previously imposed without regard to such standards. The Commission's only area of discretion in that proceeding was to determine which of the restrictions were required to comply with Section 5(2)(b).[9] Motor Transit sought to avoid that result by filing a certificate application purportedly under Section 207, and the Commission sanctioned this

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[9] The Commission clearly recognized its lack of discretion in applying the standards of Section 5(2)(b) to routes acquired by purchase in *Cincinnati, N. & C. Ry. Co.—Control—Lehigh Valley Transit*, 57 M.C.C. 4 (1950), in which it declared (pp. 49 and 52):

> "Applicants further contend that, assuming applicants are affiliate with the railway, it is not necessary that we find that the motor-vehicle service of the carriers of which control would be acquired would be used to public advantage by the railway in its operations, because the literal requirements of the proviso of section 5(2)(b) can be relaxed in order to carry out the declared national transportation policy. * * *
>
> * * * *
>
> "Apparently applicants concede that they are unable to submit evidence sufficient to meet the proof requirements of the proviso of section 5(2)(b), the application contains no such evidence, and it is not apparent to us how those requirements can be met in view of the location of the railway, the nature of the service which it renders, and the location of the motor bus carriers which the partnership would indirectly control. We do not agree with the position of applicants that we are empowered to relax the specific requirements of the statute and find that this transaction would be consistent with the public interest, without also finding that the railroad would be enabled to use service by motor vehicle to public advantage in its operation. As stated in E. T. & W. N. C. M. Transportation Co.—Lease—Imperial Transp. Co., Inc., 5 M.C.C. 196: 'Inconvenience of hardships, if any, that result from following the statute as written must be relieved by legislation.'"

obvious evasion of the statute by erroneously treating the application as if it were a bona fide certificate application under such section completely unrelated to the prior acquisition cases and which raised only issues with respect to the public convenience and necessity.

If the Commission may validly do what it has done in this case, the proviso in Section 5(2)(b) becomes meaningless. A substantial portion of all trucking operations now performed in this country by railroads or their subsidiaries are performed over routes acquired subject to the restrictions of Section 5(2)(b), or of its predecessor Section 213, which limit the motor carrier services to those which are auxiliary to or supplemental of the rail services of the railroad involved. Under the Commission's decision here, every railroad in the country which has such an operation may now come in and apply to the Commission for a certificate under Section 207 authorizing it to operate over the same routes without the restrictions imposed by the acquisition provisions of the statute, and the Commission has complete discretion to grant the request without measuring it by the standards of Section 5(2)(b). Indeed, if the Commission has correctly interpreted the statute, railroads may buy out independent motor carriers, accept the restrictions required by Section 5(2)(b), file an application under Section 207 for the same routes without the restrictions before the ink is dry on the certificate, and within a matter of a few months have the restrictions removed.

In closely similar circumstances, another federal agency, the Civil Aeronautics Board, characterized a like request for precisely what it was—a suggestion to the agency to read the applicable statutory requirements out of the Act. In enacting the Civil Aeronau-

ties Act of 1938, Congress showed the same concern for preserving the independence of air transportation from the control by surface transportation as it has in maintaining the independence and inherent advantages of rail and motor carrier operations. It therefore placed in Section 408(b) of the Civil Aeronautics Act [49 U.S.C. 488(b)] the identical restrictions found in Section 5(2)(b) of the Interstate Commerce Act so that any surface carrier or a subsidiary thereof which wishes to acquire an air carrier can do so only if the Civil Aeronautics Board, the administering agency, finds that the transaction proposed "will promote the public interest by enabling such carrier other than an air carrier to use aircraft to public advantage in its operation and will not restrain competition." The Board has applied this restriction in the same manner as has the Interstate Commerce Commission in acquisition cases before it, *i.e.*, it has required a showing that the air carrier operations will be auxiliary to or supplemental of the applicant surface carrier's operations.[19] In the *Parks Investigation Case*, 11 C.A.B. 779 (1950), the Board had before it a wholly-owned subsidiary of a transcontinental bus company as an applicant for a certificate of public convenience and necessity to operate as an air carrier. The Board held that the relationship of the applicant to the transcontinental bus system would have to be acted upon by the Board under Section 408 of the Civil Aeronautics Act in the event the subsidiary should be granted a certificate. The parent bus company and the subsidiary then filed an application with the Board for approval of the transfer to the parent of any certificate

[19] *American Export Airlines, Inc.—American Export Lines—Control—American Export Airlines*, 3 C.A.B. 619 (1942).

which might be issued to the subsidiary in the proceeding. The application was predicated upon the assumption that the Board could transfer the certificate under Section 401(i) of the Civil Aeronautics Act [49 U.S.C. 481(i)] merely on findings of the public interest and that there would then be no necessity for an approval under Section 408 with its strict requirements like those of Section 5(2)(b) of the Interstate Commerce Act. The Board, in refusing to sanction this attempted evasion of the statute, stated (pp. 788, 789):

> "Basically what the applicants are thus asking us to do is to read section 408 out of the Act through the device of a transfer under section 401(i). In so doing they presume that the requirements of section 408, as applied to this case, are merely technical in nature, and that they may be avoided by another technicality. However, such an approach misconstrues the real nature of the problem confronting us in this proceeding. That problem arises out of a clear statutory directive to restrict control of an air carrier by a surface carrier to those instances where the test of the second proviso of section 408 can be met. The courts have applied such directive to the type of situation before us. This mandate is not a mere legal technicality. It represents a substantive declaration of policy which it is our statutory obligation to enforce. We do not believe that it would be consistent with the public interest for us to attempt to avoid this obligation through the device of a transfer under section 401(i) of the Act, which does not eliminate the relationship which Congress intended to restrict. On this ground alone we would not entertain such a proposal."

This action of the Board came before the United States Court of Appeals for the District of Columbia

Circuit in *Continental Southern Lines* v. *Civil Aeronautics Board*, 197 F. 2d 397 (1952), *cert. den.*, 344 U.S. 831, and was sustained by that court. On the point here involved the court stated (197 F. 2d 397 at 403):

> "... *Even if the necessity for actual proceedings under § 408 could be avoided by the device suggested, a result we seriously question*, the transfer could not be approved unless the Board thought it in the public interest. And the concept of 'public interest' for the purposes of a transfer is just as broad as 'public interest' on an original certification proceeding. In both cases, it includes the policies and standards of § 408(b) ..." [Italics supplied]

If the judgment of the court below is sustained, then not only have the Commission and the railroads effectively read Section 5(2)(b) out of the Interstate Commerce Act, but the door has also been opened wide to a similar destruction of the requirements of Section 408(b) of the Civil Aeronautics Act.

The court below, the Commission, and Motor Transit have all been strangely silent on this aspect of the case. Neither the Commission nor Motor Transit made any attempt at all to meet this contention before the District Court although it was briefed and stressed in oral argument. The lower court also practically ignored the point in its opinion and merely answers the argument by the superficial observation (R. 194) that Section 207 does not contain the restrictive language of Section 5(2)(b). This failure to come to grips with the issue strongly suggests that there is no adequate answer and that the Commission's orders involve a clear effort to evade the limitations of the statute. The

Commission at no time has ever asserted that it has the power to authorize the acquisition of motor carrier operations by a rail subsidiary without meeting the requirements of the proviso of Section 5(2)(b). It obviously cannot make such an assertion because the statute gives it no discretion whatsoever with respect to the necessity for a rail applicant to meet the limitations there imposed. This being so, appellants cannot perceive how it is possible under the statute for the Commission to comply with the requirements thereof in an acquisition proceeding and then turn immediately around and nullify the limitations imposed without regard to the requirements of Section 5(2)(b) upon the theory that it is now considering the matter under another section of the statute.

It is submitted that the decision of the court below fails to recognize the real substance of the Commission's action and permits a complete circumvention of the statutory requirements. This Court in *United States* v. *Seatrain Lines*, 329 U.S. 424 (1947), made clear that statutory requirements cannot be evaded by mere words and labels and that it is against the substance of Commission action that the validity of its orders must be measured.

III

THE RAILWAY LABOR APPELLANTS HAVE STANDING TO CONTEST THE VALIDITY OF THE COMMISSION'S ORDERS BEFORE THE COURTS.

In its order of October 8, 1956, noting probable jurisdiction of this appeal, the Court invited counsel to discuss the issue of appellants' standing to sue. We therefore address ourselves to this question. Counsel do not know precisely what the Court may have in mind so that the discussion below may go into unneces-

sary detail or matters with which the Court is not concerned.

A. The Railway Labor Appellants Had a Legal Interest in the Proceedings Before the Commission Which Entitled Them to Participate as a Party Thereto.

Section 205(e) of the Interstate Commerce Act, 49 U.S.C. 305(e), provides generally for the intervention of "interested parties" in proceedings before the Interstate Commerce Commission arising under Part II of that Act in the following language:

> "In accordance with rules provided by the Commission, reasonable notice shall be afforded, in connection with any proceeding under this part, to interested parties and to the board of any State, or to the governor if there be no board, in which the motor-carrier operations involved in the proceeding are or are proposed to be conducted, and opportunity for intervention in any such proceeding for the purpose of making representations to the Commission or for participating in a hearing, if a hearing is held, shall be afforded to all interested parties."

In addition, Section 17(11) of the Interstate Commerce Act, 49 U.S.C. 17(11), specifically provides for the intervention of railroad employees in Commission proceedings as follows:

> "Representatives of employees of a carrier, duly designated as such, may intervene and be heard in any proceeding arising under this act affecting such employees."

Section 205(b) of the Act, 49 U.S.C. 305(b), makes the provisions of Section 17(11) also applicable to proceedings under Part II of the Act. This section gives representatives of employees an absolute right

to participate in and be heard in Commission proceedings which affect such employees. *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Ry. Co.*, 331 U.S. 519 (1947).

The employees of the parent Rock Island railroad clearly were "interested parties" to the proceeding before the Commission on Motor Transit's application, and such proceeding equally clearly "affected" them. The proposal of Motor Transit to avoid the limitations imposed upon its operations and to perform a wholly independent trucking service as a substitute for rail service of the parent constituted a threat to their job security. Such proposal was simply an attempt by the Rock Island to meet the competition of independent motor carriers for the transportation of freight in less-than-car-load lots by itself conducting independent trucking operations through its wholly owned subsidiary. Such a course of action directly affects the interests of the parent rail carrier's employees in their jobs because it involves the preservation of business by means other than the maintenance and development of rail service and results in a decline in the volume of such service with a consequent reduction in the number of jobs available to perform it. As the situation stood prior to this case, Motor Transit's permanent certificate limited its operating authority. If the position of the appellants is upheld, Motor Transit will have to continue to operate a completely coordinated rail-truck service instead of unrestricted motor operations.

This interest in preserving rail service against the substitution therefor of truck service by railroads led the employees, through their representatives, to participate in the early proceedings before the Commis-

sion involving the issue of whether the agency should authorize under Section 207 only those trucking operations of railroads or railroad subsidiaries auxiliary to or supplemental of rail service. In these proceedings the appellant Railway Labor Executives' Association was a principal exponent of the principle established by the Commission that trucking operations of railroads should be so limited. *Kansas City S. Transport Co. Inc. Com. Car. Application*, 10 M.C.C. 221 (1938). From time to time railroad employees have participated in other similar Commission proceedings for the same purpose. The employees of the Rock Island did not move to participate at the outset of the present proceeding before the Commission because of their belief that the principles they advocated were so firmly established that there was no necessity to do so. However, when the Commission abandoned those principles by its order of November 22, 1954, these employees through appellants filed petitions to intervene in the proceeding (R. 122, 161). The petition of appellant Railway Labor Executives' Association (hereinafter called the "Association") was filed on February 16, 1955 (R. 122) and separate petitions were filed by the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen on June 30, 1955, and August 17, 1955, respectively (R. 161), which were not then, but now are, members of the Association. These petitions to the Commission stated that the petitioners, or in the case of the Association, its constituent organizations, had entered into agreements with the Rock Island Railroad on behalf of the carrier's employees represented by petitioners or the members of the Association concerning rates of pay, rules and working conditions of such employees. The petitions also recited that the working conditions of

the employees would be vitally affected if the Commission's action was finalized:

> "A decision by this Commission removing previously imposed "key point" restrictions on the Railway Company's participation in the motor transport industry by allowing its subsidiary, the applicant Rock Island Motor Transit Company, to operate without such restrictions would vitally affect the work and working conditions of many of the employees of the Railway Company by the reduction of work on that carrier in favor of its subsidiary, the motor transit company."

This allegation set forth the legal interest of the Rock Island's employees in the Commission proceedings.

It is also clear that the appellants were proper parties to represent this interest of the Rock Island's employees. The appellant Association is composed of standard national and international railway labor organizations who are the duly certified representatives under the Railway Labor Act for most of the employees of the Rock Island [11] (R. 140). It has heretofore

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[11] The Association is now composed of the following twenty-two railway labor organizations:

American Railway Supervisors Association
American Train Dispatchers' Association
Brotherhood of Locomotive Firemen and Enginemen
Brotherhood of Maintenance of Way Employes
Brotherhood Railway Carmen of America
Brotherhood of Railroad Signalmen of America
Brotherhood of Railway and Steamship Clerks, Freight Handlers, Expres and Station Employes
Brotherhood of Railroad Trainmen
Brotherhood of Sleeping Car Porters
Hotel & Restaurant Employees and Bartenders International Union
International Association of Machinists

rates of pay, rules and working conditions of such employees. Said agreements confer upon such employees valuable property rights in relation to their employment. By virtue of the foregoing the intervening plaintiffs represent the interests of said employees."

The answers admit these allegations (R. 174, 179, 186). The answers also admit the allegations of paragraph 1 of the complaint that the District Court could entertain the complaint of the Association (R. 174, 179, 186). Paragraphs 9 and 12 of the complaint set forth the following claims of injury to the employees of the Rock Island (R. 148, 150):

"9. The intervening plaintiffs have exhausted their administrative remedies before the Interstate Commerce Commission and the certificate of public convenience and necessity authorized by the report and orders of the Commission on November 22, 1954 and July 6, 1955 will be issued by the Commission and operations performed thereunder to the injury of employees represented by the intervening plaintiffs unless such report and orders are suspended, enjoined, annulled, and set aside, and issuance of a certificate authorized thereunder be enjoined or, if issued, be declared invalid."

* * * *

"INJURY"

"12. The intervening plaintiffs and the employees represented by them are threatened with irreparable injury by the erroneous and unlawful actions of the Interstate Commerce Commission as enumerated in Paragraph No. 10 above, in that they are subject to loss of employment, displacement and other economic detriment if the Commission's orders are allowed to stand."

No finding to the contrary is contained in the opinion of the District Court (R. 192-195).

On October 3, 1953, the Brotherhood of Railroad Trainmen and the Order of Railway Conductors and Brakemen of America filed a joint motion with the District Court to intervene as party plaintiffs in the cause and for leave to file a complaint (R. 157). This motion, which was unopposed, was granted by the District Court (R. 171), and the complaint filed (R. 162). This complaint alleged in paragraph 1 thereof that the Court could entertain the action of the Brotherhoods (R. 163), and in paragraph 5 stated as follows (R. 163):

> "5. Movants are the duly designated collective bargaining representatives under the Railway Labor Act for certain employees of the Chicago, Rock Island and Pacific Railroad Company, the parent company of the Rock Island Motor Transit Company, and have agreements with said railroad carrier concerning rates of pay, rules and working conditions of such employees. Said agreements confer upon such employees valuable property rights in relation to their employment. By virtue of the foregoing the intervening plaintiffs represent the interests of said employees."

These allegations were admitted by the answers of the government (R. 177, 189).[12] The two Brotherhoods also alleged in paragraphs 9 and 12 of the complaint (R. 165, 167) the same injury to the employees of the Rock Island represented by them as was alleged in the complaint of the Association. The District Court did not hold to the contrary (R. 192-195). These allega-

[12] The answer of Motor Transit stood silent on these allegations (R. 183-185).

tions were sufficient to establish a legal right or interest in the Rock Island employees represented by appellants that would be injuriously affected by the Commission's orders.

Appellants submit that their participation in the District Court proceedings was not merely permissive but a matter of legal right as alleged in their motions to intervene (R. 142-144, 159, 160).

Section 2323 of the Judicial Code [28 U.S.C.A. 2323] reads in pertinent part as follows:

> "The Attorney General shall represent the Government in the actions specified in section 2321 of this title and in actions under sections 20, 23, and 43 of Title 49, in the district courts, and in the Supreme Court of the United States upon appeal from the district courts. As amended May 24, 1949, c. 139, § 116, 63 Stat. 105.
>
> "The Interstate Commerce Commission *and any party or parties in interest to the proceeding before the Commision,* in which an order or requirement is made, *may appear as parties of their own motion and as of right,* be represented by their counsel, in any action involving the validity of such order or requirement or any part thereof, and the interest of such party." (Italics supplied).

The District Court case involved the validity of an order of the Commission entered in a proceeding in which the appellants were admitted as a party in interest and clearly affected the interest of the employees of the Rock Island represented by such appellants. Indeed, as this Court stated in *Baltimore & Ohio Railroad Company* v. *United States*, 264 U.S. 258 (p. 268):

> "Moreover, the fact of intervention, allowed as it was, implies a finding by the Commission that

the plaintiffs have an interest. In the proceeding before the Commission, they opposed by evidence and argument the granting of the application. This they did as of right. For under the rules of practice, adopted by the Commission pursuant to paragraph 1 of § 17 of the Interstate Commerce Act, the intervener becomes a party to the proceeding, entitled, like any other party, to appear at the taking of testimony, to produce and cross-examine witnesses, and to be heard in person or by counsel. The intervention must be preceded by an order of the Commission granting leave; and leave can be granted only to one showing interest. *No case has been found in which either this court, or any lower court, has denied to one who was a party to the proceedings before the Commission the right to challenge the order entered therein.* On the other hand, persons who were entitled to become parties before the Commission, but did not do so, have been allowed to maintain such suits where the requisite interest was shown." (Italics supplied)

In addition, Section 17(11) of the Interstate Commerce Act, quoted above, gives an absolute right to appellants not only to participate in the proceedings before the Commission but also in the subsequent court action testing the validity of the Commission's action. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio Railroad Company*, 331 U.S. 519.

The interest of appellants in the Commission's orders as set forth above and the allegations contained in their complaints were sufficient to have justified a separate suit by them against the orders had they so chosen. This Court has held that statutory provisions such as are found in the first paragraph of Section 2323 of the Judicial Code and Section 17(11) of the

Interstate Commerce Act not only provide an absolute right of intervention but authorize persons falling within their scope to institute suits to challenge Commission's orders. *Baltimore & Ohio Railroad Company* v. *United States*, 264 U.S. 258. On this point the Court stated (pp. 267-268):

> "The plaintiffs may challenge the order because they are parties to it. The Judicial Code, § 212 (originally the Commerce Court Act, June 18, 1910, chap. 309, 36 Stat. at L. 542, Comp. Stat. § 1005), declares that any party to a proceeding before the Commission may, as of right, become a party to any suit wherein is involved the validity of such order. The section does not in terms provide that such party may institute a suit to challenge the order. But this is implied. For, otherwise, there would in some cases be no redress for the injury inflicted by an illegal order."

C. Appellants Have an Appealable Interest in the Judgment of the District Court.

The judgment of the District Court (R. 195) affirms the action of the Commission in removing the restrictions from the operations of the Rock Island's subsidiary so that the railroad may provide through that subsidiary a substitute truck service instead of a coordinated rail-truck service. If appellants were not permitted to appeal from such judgment in a proceeding in which they participated as a matter of legal right, then the purpose of Congress in enacting Section 17(11) of the Interstate Commerce Act quoted above would be thwarted. In that section Congress has given representatives of employees a specific right to "be heard" in *any* proceeding arising under the Interstate Commerce Act affecting employees. If that right is dependent upon some other party contesting

the Commission's action or is cut off at the District Court level then the employees have not been heard as Congress intended. See *Baltimore & Ohio Railroad Company* v. *United States*, 264 U. S. 258 at 268, quoted *supra*, p. 40.

Moreover, even if the express statutory provisions did not exist, the employees represented by appellants have a legal interest in the Commission's District Court judgment which entitles them to appeal therefrom. The allegations of their complaints (R. 145-151, 162-168) set forth and discussed above, show that the employees of the Rock Island represented by appellants have a legal right or interest, *i.e.*, their right in their jobs and working conditions arising out of their contracts with that carrier, admitted by the answers to be a "valuable property right," which will be injuriously affected by the Commission's action permitting a substitution of truck service for rail service by the Rock Island contrary to the requirements of statute. This interest, which has not been questioned in the pleadings before the Court, is as equally strong and immediate as that which was recognized as establishing an appealable interest in *National Coal Association, et al.* v. *Federal Power Commission*, 89 U.S. App. D.C. 135, 191 F. 2d 462 (1951). In the cited case the Railway Labor Executives' Association, among others, petitioned the United States Court of Appeals for the District of Columbia to review an order of the Federal Power Commission authorizing the construction and operation of a natural gas pipeline. The Association had intervened and participated as a party to the proceeding before the agency. Its interest was the adverse effect of pipeline competition upon railroads whose employees were represented by its

member railway labor organizations with consequent injury to such employees. This interest was almost identical to that here involved. The right of the Association to seek review of the Commission's order was attacked on the ground that it was too remote and insubstantial. This contention was rejected by the Court of Appeals in the following statement (191 F. 2d 466).[13]

> "We see no reason, and none is suggested to us, for considering the interest of employees in retention of their employment in the competing companies as any less substantial than the interest of competitors in retaining their markets or the prospect of loss of employment any less direct and immediate than the loss of markets with which the competing companies are threatened. The employees of competing companies, as much as the owners thereof, have a sufficiently direct relationship to the subject matter of the Commission's order to be 'aggrieved.'"

The status of appellants is totally unlike the situation involved in *Boston Tow Boat Co.* v. *United States*, 321 U.S. 632, in which the only interest alleged by appellant in the Commission's order was that it might establish an unfavorable precedent, or in *Moffat Tunnel League* v. *United States*, 289 U.S. 113, where suit was brought by an informal group whose only interest as found by the Court was "no more than a sentiment."[14]

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[13] The Court of Appeals subsequently reaffirmed this view in *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 746 (1956).

[14] Nor is the case like that before this Court in *Sprunt* v. *United States*, 281 U.S. 249, in which the appellant did not have a legal right involved and in which the parties with such a right did not

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the lower court should be reversed and the Commission's order declared invalid because not in conformity with the statutory requirements of the Interstate Commerce Act.

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Dated at Washington, D. C.
August 26, 1957.

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seek review of the lower court action. Here the original plaintiffs are appealing in Case No. 6 and appellants in Case No. 8 have a clear legal right involved.

APPENDIX A

National Transportation Act of 1940 [49 U. S. C. 1 et seq.]

NATIONAL TRANSPORTATION POLICY [49 U. S. C., preceding sections 1, 301, 901 and 1001]

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense."

INTERSTATE COMMERCE ACT [49 U. S. C. 1 *et seq.*]

Section 5(2)(a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to

acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock or otherwise; or

(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

Section 5(2)(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205(e)), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing; and a public hearing shall be held in all cases where carriers by railroad are involved unless the Commission determines that a public hearing is not necessary in the public interest. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction, upon the terms and conditions, and with the modifications, so found to be just and reasonable: PROVIDED, That if a car-

rier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

Section 205(g) [49 U. S. C. Section 305(g)] Any final order made under this part shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under part I: *Provided*, That, where the Commission, in respect of any matter arising under this part, shall have issued a negative order solely because of a supposed lack of power, any such party in interest may file a bill of complaint with the appropriate District Court of the United States, convened under section 2284 of title 28 of the United States Code, and such court, if it determines that the Commission has such power, may enforce by writ of mandatory injunction the Commission's taking of jurisdiction.

Application for Certificate of Public Convenience and Necessity

Sec. 206 (August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950.) [49 U. S. C. Sec. 306.] (a)(1) Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however*, That, subject to section 210, if any such carrier

or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after this section shall take effect, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this part and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further*, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this part.

Section 207. [*August 9, 1935*] [49 U. S. C., § 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however,* That no such certificate shall be issued to any common carrier of passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carrier may be authorized to engage in special or charter operations.

(b) No certificate issued under this part shall confer any proprietary or property rights in the use of the public highways.

Section 208. [*August 9, 1935.*] [49 U. S. C., § 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by

the Commission under section 204(a)(1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

(b) A common carrier by motor vehicle operating under any such certificate may occasionally deviate from the route over which, and/or the fixed termini between which, it is authorized to operate under the certificate, under such general or special rules and regulations as the Commission may prescribe.

(c) Any common carrier by motor vehicle transporting passengers under a certificate issued under this part may transport in interstate or foreign commerce to any place special or chartered parties under such rules and regulations as the Commission shall have prescribed.

(d) A certificate for the transportation of passengers may include authority to transport in the same vehicle with the passengers, newspapers, baggage of passengers, express, or mail, or to transport baggage of passengers in a separate vehicle.

Section 213(a)(1) [49 U. S. C. Section 313(a)(1)] Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under this section, the carrier or carriers or the person seeking authority therefor shall present an application to the commission, and thereupon the commission shall, after such notice as is required by section 205(f) and if deemed by it necessary in order to determine whether the findings specified below may properly be made, set said application down for public hearing. If the commission finds that the transaction proposed will be consistent with the public interest and that the conditions of this section have been

or will be fulfilled, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe: *Provided, however,* That if a carrier as defined in section . 3) of Part I, or any person which is controlled by such a carrier or affiliated therewith within the meaning of section 5(8) of this title, is an applicant, the commission shall not enter such an order unless it finds that the transaction proposed will promote the public interest, enabling such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

CERTIFICATE OF SERVICE

I, Edward J. Hickey, Jr., one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 26, 1957, I served copies of the foregoing brief on the parties hereto as follows:

1. On the United States, by mailing a copy in a duly addressed envelope, with postage prepaid, to Oliver Gasch, Esq., United States Attorney for the District of Columbia, at Room 3600-A, United States Court House, Washington, D. C., and by mailing a copy in a duly addressed envelope, with postage prepaid, to The Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with postage prepaid, to Robert Ginnane, Esq., its General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Rock Island Motor Transit Company, intervening defendant, by mailing a copy in a duly addressed envelope with airmail postage prepaid, to A. B. Howland, Esq., its attorney, at 500 Bankers Trust Building, Des Moines 9, Iowa.

4. On the Employees' Committee of Rock Island Motor Transit Co., Davenport Chamber of Commerce, *et al.*, and Shippers' Committee, intervening defendants, by mailing a copy in a duly addressed envelope with airmail postage prepaid, to D. C. Nolan, Esq., their attorney, at Suite 405 Iowa State Bank Bldg., Iowa City, Iowa.

5. On the National Industrial Traffic League, *amicus curiae*, by mailing a copy in a duly addressed envelope,

with airmail postage prepaid, to John S. Burchmore, Esq., its attorney, at 2106 Field Building, Chicago 3, Illinois.

6. On the American Trucking Associations, Inc., *et al.*, plaintiffs, by mailing a copy in a duly addressed envelope with postage prepaid, to its attorney, Peter T. Beardsley, Esq., 1424 16th Street, N. W., Washington, D. C.

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